No. 97-1943 (4)

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON, *et al.*,

*Petitioners*,

—v.—

UNITED AIR LINES, INC.,

*Respondent.*

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has fought to give meaning to the concept of the "equal protection of the laws" enshrined in the Fourteenth Amendment for members of racial, ethnic, and religious minorities, for women, and for persons with disabilities. The ACLU has vigorously supported the enactment and enforcement of the major federal civil rights statutes that are designed to end discrimination in employment including, in particular, the Americans with Disabilities Act (ADA), Pub. L. No. 101-336, 104 Stat. 327 (1990). Because the decision below threatens to limit substantially the protections afforded by that legislation, this case involves issues of critical importance to the ACLU and its members.[2]

## STATEMENT OF THE CASE

Petitioners Karen Sutton and Kimberly Hinton are twin sisters who applied for commercial airline pilot positions with respondent United Air Lines, Inc. (United). United re-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Rather than burdening the Court with multiple briefs, *amicus* respectfully requests that the Court consider the arguments presented herein in connection with its consideration of the related cases of *Murphy v. United Parcel Service, Inc.*, No. 97-1992, and *Albertson's, Inc. v. Kirkingburg*, No. 98-591.

jected their applications because each of the sisters has uncorrected vision that is worse than 20/100 in each eye. The sisters' corrected vision is 20/20 in both eyes.

Petitioners sued United for employment discrimination under the ADA. They alleged that their uncorrected vision is a disability and that, with corrective eyeglasses or contact lenses, they are qualified to serve as commercial pilots. Therefore, petitioners contended that United's policy of refusing to hire pilots with uncorrected vision worse than 20/100 constituted unlawful discrimination against persons with disabilities.

Neither the district court nor the court of appeals ever considered whether, with corrective lenses, the sisters are qualified to be airline pilots or whether United's policy is justified. Instead, both courts ruled that the petitioners are not "individuals with a disability" who can invoke the ADA. First, both courts ruled that the petitioners do not have a physical impairment that substantially limits a major life activity because their vision has been corrected. Second, both courts ruled that United did not regard the sisters as disabled; it simply viewed them as lacking a requirement of the pilot positions they sought. Petitioners sought review in this Court.

## SUMMARY OF ARGUMENT

Congress enacted the ADA to provide a comprehensive national mandate for the elimination of discrimination against persons with disabilities, including employment discrimination. To effectuate this goal, Congress adopted a broad definition of "disability" in the ADA. Congress took this definition of disability directly from the definition of "handicapped individual" in the Rehabilitation Act, 29 U.S.C. §794, which Congress knew had been interpreted broadly, and instructed courts to interpret the ADA at least



as broadly. As this case demonstrates, a narrow reading of the ADA's definition of disability would frustrate the purposes of the Act by effectively precluding courts from ever reaching the critical inquiry under the Act: whether the plaintiff is qualified, with or without reasonable accommodation, to perform the essential functions of the job.

Under the first prong of the ADA's definition of disability, the question of whether a plaintiff's physical or mental impairment substantially limits a major life activity must be determined without regard to mitigating or corrective measures. This reading of the statute is required by the clear legislative history of the ADA, uniform regulatory guidance from the administrative agencies charged with enforcement of the Act, and the virtually unanimous weight of appellate authority. Most importantly, consideration of mitigating measures in the determination of disability is logically inconsistent with the underlying purpose and structure of the ADA itself. It would create an absurd result if the corrective measures that often make individuals with disabilities qualified for jobs could be used to exclude them from coverage under the ADA in the first place.

For similar reasons, under the third prong of the ADA's definition of disability, an employer who takes an adverse employment action against a person because of a physical or mental impairment necessarily regards that person as substantially limited in working and hence as disabled for purposes of the Act. Again, the clear legislative history of the ADA and its interpretation by regulatory agencies, along with this Court's interpretation of an identical provision in the Rehabilitation Act, *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), provide strong support for this reading of the "regarded as" prong of the ADA. A number of lower courts, including the court below, have adopted an unduly narrow construction of this third prong by taking the narrow "class of jobs" exception that applies to the first

prong of the definition and misapplying that exception to the third prong. This Court should correct that misunderstanding and clarify that a person denied employment because of an impairment has necessarily been regarded as disabled.

## ARGUMENT

### I. THE ADA WAS INTENDED TO BROADLY PROTECT QUALIFIED PERSONS WITH PHYSICAL AND MENTAL IMPAIRMENTS FROM DISCRIMINATION IN EMPLOYMENT

#### A. Congress, In Enacting The ADA, Sought To Provide Broad Protection Against Employment Discrimination For Persons With Disabilities

Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. §12101(b)(1), and "to bring persons with disabilities into the economic and social mainstream of American life . . . ." S. Rep. No. 101-116, at 2 (1989); H.R. Rep. No. 101-485, pt.2, at 22 (1990). Congress recognized, after extensive legislative hearings, that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing," 42 U.S.C. §12101(a)(1), and that discrimination against persons with disabilities was a pervasive, societal problem.

Congress was particularly concerned about employment discrimination against individuals with disabilities based on fears, myths, and stereotypes about their conditions. Congress noted that two-thirds of all working-age Americans with disabilities were unemployed, S. Rep. No. 101-116, at 9; H.R. Rep. No. 101-485, pt.2, at 32, and concluded that "the continuing existence of unfair and unnecessary discrimination and prejudice . . . costs the United States billions of



dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. §12101(a)(9).

Thus, when Congress passed the ADA by overwhelming majorities in both houses,[3] it understood that it was enacting "comprehensive" remedial legislation against discrimination based on disability. *See Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1233 (9th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3433 (Jan. 8, 1999)("The Act was drafted in broad language in order to protect a large class of physically impaired individuals from unwarranted discrimination -- it was not drafted narrowly to protect only those with the most severe disabilities"). Courts construing the ADA, and in particular its definition of "disability," 42 U.S.C. §12102(2), must be guided by this broad congressional purpose. *Cf. Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998)("Conceptually, it seems more consistent with Congress's broad remedial goals in enacting the ADA, and it also makes more sense, to interpret the words 'individual with a disability' broadly, so the Act's coverage protects more types of people against discrimination.").

#### B. Congress Adopted The ADA's Definition Of Disability From Title V Of The Rehabilitation Act, Which Had Been Interpreted Expansively

The ADA defines "disability" in 42 U.S.C. §12102(2):

> The term "disability" means, with respect to an individual --
> (A) a physical or mental impairment that substantially limits one or more of the major life

---

[3] The votes on final passage of the ADA were 377-28 in the House of Representatives and 91-6 in the Senate. 136 Cong.Rec. H4629-30 (daily ed. July 12, 1990); 136 Cong.Rec. S9695 (daily ed. July 13, 1990).

activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.

As this Court has recognized, this definition of disability "is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973, and the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988." *Bragdon v. Abbott*, 524 U.S. __, __, 118 S.Ct. 2196, 2202 (1998)(citations omitted); *see also* S. Rep. No. 101-116, at 21; H.R. Rep. No. 101-485, pt.2, at 50; H.R. Rep. No. 101-485, pt.3, at 27.[4] Normally, "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon*, 118 S.Ct. at 2202. As this Court observed, the Congress went further in the ADA to drive this point home:

> In this case, Congress did more than suggest this construction; it adopted a specific statutory provision in the ADA directing as follows:
>
> "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. §790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. §12201(a).

[4] The change in terminology from "handicap" to "disability" represented an effort by Congress to utilize "up-to-date, currently accepted terminology." As each of the committee reports explained: "No change in definition or substance is intended nor should be attributed to this change in phraseology." S. Rep. No. 101-116, at 21; H.R. Rep. No. 101-485, pt.2, at 51; H.R. Rep. No. 101-485, pt.4, at 36.



> The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.

118 S.Ct. at 2202.

In cases decided under Section 504 of the Rehabilitation Act (Section 504) prior to the enactment of the ADA, the term "handicapped individual" was applied very broadly to persons with a wide variety of physical and mental impairments.[5] When deciding cases under Section 504, moreover,

[5] *Doherty v. Southern College of Optometry*, 659 F.Supp. 662 (W.D. Tenn. 1987)(retinitis pigmentosa); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977)(vision in only one eye); *Strathie v. Dep't of Transp.*, 547 F.Supp. 1367 (E.D.Pa. 1982)(impaired hearing and use of hearing aids); *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402 (5th Cir. 1983)(depressive neurosis); *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985)(manic depressive syndrome); *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987)(epilepsy); *Wolff v. South Colonie Cent. School Dist.*, 534 F.Supp. 758 (N.D.N.Y. 1982)(congenital limb deficiency); *Pushkin v. University of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (multiple sclerosis); *Bolthouse v. Continental Wingate Co.*, 656 F.Supp. 620 (W.D.Mich. 1987)(cerebral palsy); *Daubert v. United States Postal Service*, 733 F.2d 1367 (10th Cir. 1984)(degenerative spinal condition); *Dancy v. Kline*, 639 F.Supp. 1076 (N.D.Ill. 1986)(chronic lower back syndrome with disc disease); *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981)(limited mobility of arm and shoulder); *Coley v. Secretary of Army*, 689 F.Supp. 519 (D.Md. 1987)(osteoarthritis in hip); *Ward v. Mass. Bay Transp. Auth.*, 550 F.Supp. 1310 (D.Mass. 1982)(artificial leg); *Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983)(learning disabilities); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982)(diabetes); *Bailey v. Tisch*, 683 F.Supp. 652 (S.D. Ohio 1988)(heart disease); *Ackerman v. Western Elec. Co.*, 643 F.Supp. 836 (N.D.Cal. 1986)(asthma); *Poole v. South Plainfield Bd. of Educ.*, 490 F.Supp 948 (D.N.J. 1980)(absence of kidney); *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979)(hepatitis B carrier); *Ross v. Beaumont Hosp.*, 687 F.Supp. 1115 (E.D.Mich. 1988)

(continued...)

courts tended to accept readily that a plaintiff was a member of a protected class, *i.e.*, a handicapped person, and would then move on to the merits of the case. As one district court noted: "Very few cases spend much time on this issue [of who is a handicapped individual], as the issue usually requires little analysis." *Tudyman v. United Airlines*, 608 F. Supp. 739, 744 (C.D.Cal. 1984).[6] This Court itself recognized, prior to the enactment of the ADA, that the definition of "handicapped individual" in the Rehabilitation Act was "broad." *School Bd. of Nassau County v. Arline*, 480 U.S. at 285.

By drawing the definition of "disability" in the ADA from the Rehabilitation Act, and by enacting the construction rule in 42 U.S.C. §12201(a), Congress clearly expressed its intent that the class of people protected by the ADA should be at least as sweeping as those who were found to have been covered under Section 504. Courts construing the ADA's definition of disability must respect this legislative judgment.

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[5] (...continued)
(narcolepsy); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986) (birth defects); *Fynes v. Weinberger*, 677 F.Supp. 315 (E.D.Pa. 1985) (asbestosis); *Kling v. County of L.A.*, 633 F.2d 876 (9th Cir. 1980) (Crohn's disease). These examples are taken from Robert L. Burgdorf, Jr., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 137-40 (1995).

[6] *Tudyman* itself represents a small class of cases that proved to be an exception to this rule. These were cases in which courts concluded that plaintiffs did not have a real *impairment* at all, but simply had unusual physical characteristics. *See, e.g., Tudyman*, 608 F.Supp. at 745-46 (muscular build is not an impairment); *de la Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986)(left-handedness is not an impairment); *Steven v. Stubbs*, 576 F.Supp. 1409 (N.D.Ga. 1983)(temporary illness with no permanent effect on plaintiff's health is not an impairment). In this case, there is no dispute that, absent corrective measures, petitioners have an impairment that substantially limits the life activity of seeing.



### C. The Critical Issue Under the ADA Is Whether The Plaintiff Is Qualified To Perform The Essential Functions Of The Job; Courts That Construe The ADA's Definition Of Disability Too Narrowly Never Reach This Critical Inquiry

It is important to stress that the determination whether an ADA plaintiff has a disability is the beginning, not the end, of the legal analysis of an ADA employment claim. Title I of the ADA prohibits discrimination "against a *qualified* individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a) (emphasis added). The term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* at §12111(8).[7]

---

[7] A "reasonable accommodation" is a modification to policies or practices or to physical surroundings, or the use of an assistive device or individual (such as a sign language interpreter or reader), that enables a person with a disability to fully perform the functions of a job. 42 U.S.C. §12111(9)(A) & (B). The "reasonable" component of "reasonable accommodation" does not refer to financial feasibility, but rather to whether the modification or acquisition will be reasonably *effective* in allowing the person with the disability to perform the job. Financial and practical costs are reflected instead in the "undue hardship" defense available to employers: an employer is not required to make a reasonable accommodation if doing so would impose an "undue hardship" on the business. 42 U.S.C. §12112(b)(5). *See generally* Feldblum, "The (R)evolution of Physical Disability Anti-Discrimination Law: 1976-1996," Mental and Physical Disability Law Rep. 613 (Sept.-Oct. 1996).

Congress was quite clear that the ADA protects only qualified workers. As the Senate Report explained:

> By including the phrase "qualified individual with a disability," the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose o[r] effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.

S. Rep. No. 101-116, at 26; *see also* H.R. Rep. No. 101-485, pt.2, at 55 (same). The report from the House Judiciary Committee was perhaps even more blunt:

> The underlying premise of [Title I of the ADA] is that persons with disabilities should not be excluded from job opportunities unless they are actually unable to do the job. The requirement that job criteria actually measure skills required by the job is a critical protection, because stereotypes and misconceptions about the abilities and inabilities of persons with disabilities continue to be pervasive.

H.R. Rep. No. 101-485, pt.3, at 31. Thus, before a plaintiff with a disability can prevail on an ADA employment claim, she will have to establish both that she was discriminated against because of her disability and also that, with or without reasonable accommodation, she is qualified for the job. *Cf. Kirkingburg v. Albertson's, Inc.*, 143 F.3d at 1233.

Like the ADA's definition of disability, this multi-step analysis and focus on qualification was taken directly from the Rehabilitation Act. As this Court explained in *Arline*, "The Act is carefully structured to replace . . . reflexive re-



actions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of 'handicapped individual' is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief." 480 U.S. at 284-85 (emphasis in original). "'[W]here reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.'" *Id.* at 287 n.17 (quoting 45 C.F.R. pt.84, App.A, p.315 (1985)).

Unfortunately, if a court defines disability in an impermissibly narrow manner and improperly concludes that an ADA plaintiff is not a person with a disability, the case will never reach these critical questions of qualification, reasonable accommodation, and undue hardship. In such a case, the plaintiff will be denied relief even if the defendant employer does not dispute that the plaintiff has a physical or mental impairment, that the defendant took an adverse employment action because of that impairment, and that the plaintiff can perform the essential functions of the job. As the First Circuit explained in *Arnold*:

> Arnold's diabetes makes him just the type of person the ADA was designed to protect . . . . Yet under UPS's and the district court's interpretation of the ADA, a person in this archetypal situation is not protected from discrimination by the ADA because he is not disabled and hence not even a proper plaintiff under the Act. According to UPS, in such circumstances, the trier of fact never gets to the merits of the alleged discrimination, of the 'qualified individual' requirement, or of reasonable accommodation.

136 F.3d at 862.[8]

Thus, for this reason as well, a broad construction of the definition of disability is essential to give effect to the ADA's remedial scheme. With this understanding in place, we now turn our attention to the two particular statutory interpretation questions before the Court.

## II. UNDER THE ADA, WHETHER A PHYSICAL OR MENTAL IMPAIRMENT SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY MUST BE DETERMINED WITHOUT REGARD TO MITIGATING OR CORRECTIVE MEASURES

Petitioners Karen Sutton and Kimberly Hinton contend that they are persons with disabilities under the first prong of the ADA's definition of disability because their poor eyesight is a physical impairment that substantially limits them in the major life activity of seeing. The court below agreed that their poor vision was "a physical impairment within the meaning of the ADA." 130 F.3d at 900. The Tenth Circuit nevertheless concluded that the petitioners were not substantially limited in seeing because their eyesight had been corrected through the use of eyeglasses or contact lenses; in the court of appeals' view, "[t]he determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual." *Id.* at 902.

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[8] *Cf. Arline*, 480 U.S. at 285 (exclusion of all persons with actual or perceived contagious diseases "would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.' Rather, they would be vulnerable to discrimination on the basis of mythology -- precisely the type of injury Congress sought to prevent").



The Tenth Circuit's decision to consider mitigating measures in the determination of disability is erroneous and must be reversed. It is flatly inconsistent with the clear legislative history of the ADA, uniform regulatory guidance from the administrative agencies charged with enforcement of the statute, and the virtually unanimous weight of appellate authority from its sister circuits. Most importantly, consideration of mitigating measures is logically inconsistent with the underlying purpose and structure of the ADA itself.

Although the statutory text is silent on the question, the legislative history of the ADA is replete with explicit references to Congress' clear intention that a person's disability should be determined without regard to mitigating or corrective measures. The Senate Report states:

> A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people . . . . Moreover, whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.

S. Rep. No. 101-116, at 23. The report from the House Education and Labor Committee repeats this guidance virtually verbatim, then adds: "Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication." H.R. Rep. No. 101-485, pt.2, at 52. Finally, the report from the House Judiciary Committee makes the point in a slightly different manner: "The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable ac-

commodations, would result in a less-than-substantial limitation." H.R. Rep. No. 101-485, pt.3, at 28. Thus, there can be no question that Congress understood that a corrected disability was still a disability under the ADA.

The agencies charged with responsibility to enforce the ADA followed this express intent of Congress in promulgating regulations and interpretive guidance under the statute. The Equal Employment Opportunity Commission (EEOC), the agency responsible for issuing regulations under Title I, 42 U.S.C. §12116, adopted extensive Interpretive Guidance in conjunction with its regulations.[9] *See* 29 C.F.R. pt.1630, Appendix. The interpretive guidance to the regulation defining the term "substantially limits," 29 C.F.R. §1630.2 (j), provides, in relevant part: "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt.1630, App., p.348. In the section-by-section analysis that accompanied the publication of its final regulations, the EEOC explained that it had revised the interpretive guidance to make this point clear, in response to comments received on the proposed guidance from "disability rights groups, which were concerned that the [proposed] discussion could be misconstrued to exclude from ADA coverage . . . individuals with disabilities who function well because of assistive devices or other mitigating measures." 56 Fed.Reg. at 35,728.

The regulations issued by the Department of Justice to implement Titles II and III of the ADA reach the same conclusion. 28 C.F.R. §35.104 and 28 C.F.R. §36.104 contain regulatory definitions of "disability." The accompanying

[9] The proposed version of this Interpretive Guidance was itself published for public comment and revised in accordance with the comments received, just like the underlying regulations. 56 Fed.Reg. 35,726 (1991).



analysis prepared by the Justice Department provides:

> The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

28 C.F.R. pt.35, App.A, p.442 (1998); 28 C.F.R. pt.36, App.B, p.583 (1998).

The court of appeals rejected the EEOC's interpretive guidance on this issue, 130 F.3d at 902, and held that it was not subject to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). 130 F.3d at 899 n.3. But, as this Court explained in *Bragdon*, the views of agencies charged by Congress with responsibility for issuing implementing regulations, rendering technical assistance, and enforcing the ADA "are entitled to deference." *Bragdon*, 118 S.Ct. at 2209 (relying on both Justice Department regulations and accompanying analysis). This is especially true in this case where the statutory text does not explicitly address the question of mitigating measures, *Chevron*, 467 U.S. at 844, and, where, as here, there has been a consistent course of agency interpretation by every agency charged with ADA responsibilities. *Bragdon*, 118 S.Ct. at 2207.

In addition to Congress, the EEOC, and the Department

of Justice, virtually every court of appeals other than the Tenth Circuit to consider the question has concluded that the determination of disability under the ADA must be made without regard to mitigating measures. *See, e.g., Arnold v. UPS*, 136 F.3d 854; *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454 (7th Cir. 1995); *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 693 (1998); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1349 (1997); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *cf. Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998)(following EEOC guidelines and legislative history, but construing them narrowly). *But see Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997). This consistent pattern of appellate precedent lends further support to the conclusion that the Tenth Circuit's ruling is in error.

The court below concluded that the EEOC's Interpretive Guidance concerning mitigating measures was "in direct conflict with the plain language of the ADA" because, with their corrective lenses, the petitioners were not "substantially limit[ed]" in seeing. 130 F.3d at 902. This position, however, "confuses the disease with its treatment." *Matczak*, 136 F.3d at 937. The petitioners' poor eyesight does substantially limit their major life activity of seeing; their eyeglasses and contact lenses simply correct that limitation.[10]

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[10] The assumption that the EEOC's guidance directly conflicts with the plain language of the ADA was expressly rejected by the Eleventh Circuit in *Harris*:

> [T]here is no direct conflict between the interpretation
>
> (continued...)



Finally, and perhaps most importantly, the Tenth Circuit's approach is logically inconsistent with the purpose and structure of the ADA. The court of appeals concluded its discussion of the mitigating measures issue with the suggestion that the petitioners were trying to have their cake and eat it too:

> Plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts their major li[f]e activity of seeing and, thus, they are not qualified individuals for a pilot position with United, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing.

130 F.3d at 903.

But it is the lower court's analysis that is logically flawed. It "conflates two separate parts of the ADA": the threshold determination of whether a person is disabled and the subsequent determination of whether such a person has been discriminated against in connection with an employment position for which she is qualified. *See Arnold v. UPS*, 136 F.3d at 863. Under the Tenth Circuit's misinterpretation of the statute, an employer can blithely discriminate against a qualified individual with a correctable or mit-

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[10] (...continued)

> contained in the appendix to the regulations and the statute itself. There is nothing inherently illogical about determining the existence of a substantial limitation without regard to mitigating measures such as medicines or assistive or prosthetic devices, and there is nothing in the language of the statute itself that rules out that approach.

102 F.3d at 521.

igable disability without fear of ADA liability because the target of the discrimination would be unable to invoke the ADA's protections. *Id.* at 862.

Under the proper, logical ADA analysis, a court first determines whether a person's physical or mental impairment substantially limits that person in some major life activity. Because this first step of the analysis is designed simply to determine whether the individual has the type of serious medical condition contemplated by Congress, courts should make that determination without regard to any corrective devices or mitigating measures.

In the second step of the analysis, a court must determine whether an individual who has a serious medical condition is nonetheless still qualified to perform the job in question. At that stage, corrective devices or measures used by the individual might well be critical. Indeed, it is often by using such corrective measures that people with serious medical conditions become qualified for employment. As examples, a person with diabetes who takes insulin, a person with epilepsy who takes anti-seizure medication, a person without a leg who uses a prothesis, and a person with serious myopia who uses glasses may all ultimately be qualified for the jobs they seek, despite the fact that they have serious medical impairments.

It would create an absurd "Catch-22," however, if the very corrective measures that make these individuals with disabilities qualified for jobs also serve to exclude them from coverage under the ADA in the first place. Under such a misguided reading of the ADA, the majority of individuals with serious medical conditions who would remain covered would likely also be the ones not qualified for the jobs they seek. Congress could not have intended such an



absurd result.[11] Rather, it is precisely persons such as petitioners -- *i.e.*, those with disabilities that do not preclude them from working -- for whom Congress enacted Title I of the ADA in order to unlock the doors to gainful employment.[12]

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[11] The fallacy in the Tenth Circuit's reasoning is demonstrated by a hypothetical posed by the First Circuit in *Arnold*. Under the Tenth Circuit's interpretation, "someone who could not afford treatment for his impairment would be protected by the ADA from discrimination in hiring. But once he was hired and obtained treatment under the employer's health plan, he would lose the ADA's protection because he would no longer be 'disabled.' The employer could then fire him on the basis of his disability without fear of the protective consequences embodied in the ADA." 136 F.3d at 862.

[12] The fact that this analysis would bring numerous people in this country who have significantly impaired eyesight and wear corrective lenses within the coverage of the ADA should not be a cause for concern. Most civil rights laws cover a vast number of people. For example, Title VII of the Civil Rights Act of 1964 covers every single person in this country because everyone has a race and a gender. Nevertheless, most white people and most men (and, for that matter, many women and minorities) do not experience the type of job discrimination that requires them to invoke the protection of Title VII. Similarly, while the ADA covers a large number of people with corrective lenses, the vast majority of such individuals will never encounter the type of job discrimination that would require them to invoke the protection of the Act.

## III. AN EMPLOYER WHO TAKES AN ADVERSE EMPLOYMENT ACTION AGAINST A PERSON BECAUSE OF A PHYSICAL OR MENTAL IMPAIRMENT NECESSARILY REGARDS THAT PERSON AS SUBSTANTIALLY LIMITED IN WORKING AND HENCE AS DISABLED FOR PURPOSES OF THE ADA

Even if a person does not have an actual physical or mental impairment that substantially limits a major life activity, or has a relatively nonserious physical or mental impairment that does not in practice limit any major life activity, she may nevertheless qualify as an individual with a disability for purposes of the ADA if she is "regarded as having such an impairment." 42 U.S.C. §12102(2)(C). The EEOC regulations define this term to mean:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
> (3) [Does not have a physical or mental impairment as defined in the regulations] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. §1630.2(l). According to the court below, petitioners did not satisfy the third prong of the ADA's definition of disability because United did not regard them as substantially limited in the major life activity of working; it merely viewed them as unable to perform the requirements of its pilot position. 130 F.3d at 905.



The Tenth Circuit's understanding of the "regarded as" prong of the definition of disability is inconsistent with congressional intent in establishing this third prong of the definition, with the EEOC's regulatory guidance concerning the "regarded as" prong, and with this Court's explication of an identical provision under Section 504. Under a proper interpretation of the third prong, the determination that United considers the petitioners unfit to be pilots because of their eyesight satisfies the statutory requirement that United "regards" them as substantially limited in working and therefore as persons with disabilities under the Act. In fact, any employer who takes an adverse employment action against a person *because of* a physical or mental impairment necessarily regards that person as substantially limited in the life activity of working and hence as a person with a disability. As the EEOC's Interpretive Guidance explains:

> [I]f an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear, or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear, or stereotype" can be drawn.

*See* 29 C.F.R. pt.1630, App., p.350.

This Court in *Arline*, interpreting an identical provision under Section 504, articulated the following rationale for the "regarded as" prong:

> [T]he basic purpose of §504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By

> amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

480 U.S. at 282-84 (footnotes omitted).

In response to an assertion by the Solicitor General at oral argument that such an interpretation of the third prong would be a "totally circular argument which lifts itself by its bootstraps,"[13] *id.* at 283 n.10, this Court respectfully disagreed. It pointed out that:

> The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work.

*Id.*[14]

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[13] The perceived circularity of the interpretation stems from the fact that it is the defendant's allegedly discriminatory act (such as a failure to hire or the decision to fire) that gives rise to the plaintiff's coverage under the Act.

[14] In a previous footnote, this Court noted that the legislative history to Section 504 reflected "Congress' desire to prohibit discrimination based on the effects a person's handicap may have on others . . . ." 480 U.S. at 282 n.9. The Department of Justice subsequently observed that "the [Supreme Court] relied on legislative history which does indicate that at least some Members of Congress believed that the perception of a physical disability by others does not have to include the belief that the perceived condition results in a limitation of major life activities, but

(continued...)



When Congress included the third prong of the definition of disability in the ADA, it relied heavily on this Court's explication of that prong as set forth in *Arline*. For example, the Senate Report described, in some detail, this Court's analysis in *Arline* and then concluded:

> A person who is excluded from *any* activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity. For example, . . . if an employer refuses to hire someone . . . because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.

S. Rep. No. 101-116, at 24 (citations omitted)(emphasis added); *see also* H.R. Rep. No. 101-485, pt.2, at 53 (same); H.R. Rep. No. 101-485, pt.3, at 30 (to the same effect).[15]

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[14] (...continued)
simply that the perception of the condition by others in itself has that effect." Memorandum from Douglas W. Kmiec, Acting Ass't Att'y Gen., Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), *reprinted in* 8 Fair Empl. Prac. Cases (BNA) No. 641 at 405:8, n.14 (discussing footnote 9 in *Arline*).

[15] The House Judiciary Committee elaborated further:

> Sociologists have identified common barriers that frequently result in employers excluding disabled persons. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation, and accessibility, and acceptance by co-workers and customers . . . . This list of frequent workplace concerns is not exhaustive. It illustrates, however, the attitudinal barriers that Congress clearly intended to include within the meaning of "regarded as" having a disa-

(continued...)

The EEOC's Interpretive Guidance to its implementing regulations closely tracks this legislative history. *See* 29 C.F.R., pt.1630, App., p.350.

Both Congress and the implementing agency were thus quite clear: when a person is denied a position based on an actual or perceived physical or mental condition, the offending employer has regarded that individual as substantially limited in working, and hence as a person with a disability under the "regarded as" prong of the definition. Such an individual is then entitled to invoke the protection of the ADA.

Despite this clear legislative history and regulatory guidance, a significant number of courts, like the court below, have adopted an unduly narrow construction of the third prong of the definition of disability and have thereby prevented plaintiffs from pursuing their claims. Courts that have reached this result have done so by taking a narrow exception that applies to the *first* prong of the definition, and misapplying that exception to the *third* prong of the definition of disability.[16]

Under the first prong of the definition of disability, an individual is substantially limited in the major life activity of working if she is

> significantly restricted in the ability to perform

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[15] (...continued)
bility under the Rehabilitation Act, and now under the ADA.

H.R. Rep. No. 101-485, pt.3, at 30.

[16] *See, e.g., Ryan v. Grae & Rybicki*, 135 F.3d 867, 872 (2d Cir. 1998); *Deas v. River West, L.P.*, 152 F.3d 471, 481 (5th Cir. 1998); *Skorup v. Modern Door Corp.*, 153 F.3d 512, 515-16 (7th Cir. 1998); *Miller v. City of Springfield*, 146 F.3d 612, 614-15 (8th Cir. 1998); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (9th Cir. 1997); *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366 (11th Cir. 1998).



> either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. §1630.2(j)(3).[17]

The EEOC guidance explains that this type of analysis should be quite rare in determining whether an individual has a disability under the first prong of the definition. Most individuals with physical or mental impairments will be limited in some major life activity *other* than working. For example, a person with severe arthritis may be limited in lifting and bending, a person with a stroke may be limited

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[17] This analysis with regard to individuals who are unable to perform a "single, particular job" is drawn from the legislative history of the ADA. As the report from the House Judiciary Committee explained:

> A person with an impairment who is discriminated against in employment is also limited in the major life activity of working. However, a person who is limited in his or her ability to perform only a particular job, because of circumstances unique to that job site or the materials used, may not be substantially limited in the major life activity of working. For example, an applicant whose trade is painting would not be substantially limited in [t]he major life activity of working if he has a mild allergy to a specialized paint used by one employer which is not generally used in the field in which the painter works.

H.R. Rep. No. 101-485, pt.3, at 29. Even if this analysis were applicable to the present case, which we contend it is not, petitioners should nevertheless have been found to be substantially limited in working. There was nothing unique about the job site or materials used on United's airplanes that precluded pilots with petitioners' impairment. Rather, United considered petitioners' condition disqualifying for the entire "class" of pilot positions.

in walking and talking, and a person with esophageal fungal infections may be limited in eating. Indeed, it should be the exception for any person with a serious medical condition to argue that her impairment substantially limits her in the life activity of working -- particularly since, in the second stage of analysis under the ADA, that individual must also prove she is qualified to work. Thus, as the EEOC guidance explained:

> If an individual is *not* substantially limited *in any other major life activity*, the individual's ability to perform the major life activity of working should be considered. If an individual *is* substantially limited in any other major life activity, *no* determination should be made as to whether the individual is substantially limited in working.

29 C.F.R. pt.1630, App., p.348 (emphasis added).

There are some very rare situations, however, as one of the committee reports observed, in which an impairment is so unique that the *only* limitation it will cause the individual is in that person's work setting. *See* n.17, *supra*. In those rare cases, the EEOC guidance explains that the individual must prove she is precluded from working in a class of jobs or a broad range of jobs, not just a single job for one particular employer. 29 C.F.R. pt.1630, App., p.348.[18]

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[18] A surprising number of courts have either completely misunderstood or ignored the EEOC's regulations in this regard. Under the first prong of the ADA's definition, they have analyzed whether a plaintiff's impairment limits the individual's ability to work, even though the impairments at issue could clearly have been understood as limiting life activities *other* than working. *See, e.g., Olson v. GE Astrospace*, 101 F.3d 947, 952-53 (3d Cir. 1996)(depression, sleep disorder, and multiple personality disorder); *Ellison v. Software Spectrum*, 85 F.3d 187, 191 (5th (continued...)



While this narrow exception that requires an analysis of "class of jobs" or "broad range of jobs" may appropriately be invoked in certain rare situations under the first prong of the definition, it has no place under the third prong of the definition. As the House Judiciary Committee explained, in discussing the "regarded as" prong of the definition of disability:

> Thus, a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.

H.R. Rep. No. 101-485, pt.3, at 30-31. This same distinction was made in the EEOC Interpretive Guidance to the third prong of the definition of disability. 29 C.F.R. pt. 1630, App., p.350.

This distinction, drawn by the committee reports and the EEOC, makes perfect sense. A plaintiff's argument

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[18] (...continued)
Cir. 1996)(radiation treatment for breast cancer); *Bolton v. Scrivner*, 36 F.3d 939, 944 (10th Cir. 1994)(work-related injury to shoulder and both feet); *Redlich v. The Albany Law School of Union University*, 899 F. Supp. 100, 106-07 (N.D.N.Y. 1995)(impaired use of leg, arm, and hand due to stroke). In most of these cases, the courts rely on the evidence plaintiffs have submitted to demonstrate that they are *qualified* for the jobs in question to rule that the plaintiffs are not substantially limited in working and hence not covered under the ADA in the first place. *But see Homeyer v. Stanley Tuchin Associates*, 91 F.3d 959 (7th Cir. 1996) (correctly rejecting this "Catch-22" for plaintiff with chronic severe allergic rhinitus and sinusitis).

under the third prong of the definition is not that her impairment *actually* limits her in the life activity of working, as might be the case in certain rare situations under the first prong of the definition. Rather, her argument is that she is being *regarded* as limited in working by the defendant. In such circumstances, the plaintiff should logically be able to prove her point simply by establishing that the defendant refused to hire her, or fired her, *because of* her impairment. Whether the defendant felt the plaintiff was capable or not capable of performing any number of other jobs in the economy should be irrelevant to the "regarded as" analysis under the third prong of the definition. Indeed, that issue never even arose in this Court's analysis of the identical third prong in *Arline*.

Finally, the misguided incorporation of first-prong "class of jobs" analysis into the third prong of the ADA's definition yields an irrational and ironic result. Although the "regarded as" prong is logically supposed to turn solely on the perceptions of the employer, the inclusion of a focus on a "class of jobs" has led some lower courts -- as a practical matter -- to also look at how other employers in the same industry treat a particular disability. For example, in this case, the Tenth Circuit explained:

> We are concerned with whether United regards plaintiffs as 'disabled,' not whether the airline industry as a whole regards individuals with uncorrected vision of 20/100 or worse as 'substantially limited' in a major life activity . . . . However, we do examine the airline industry to assist in determining whether Plaintiffs' impairment substantially limits their employment generally in a "class of jobs."

130 F.3d at 905. The result of such an analysis is perverse. If a business has the same standards for exclusion of persons



with disabilities as others in the industry, it would be subject to suit under the ADA because the plaintiff will legitimately have been perceived as being substantially limited in working in a class of jobs.[19] However, if a business has a uniquely discriminatory policy that is not shared by others in the field, that business would be shielded from ADA liability because the plaintiff would not in practice have been excluded from a "class of jobs." Congress could not have intended such an irrational result.

Again, it is important to stress that a determination that an employer fails to hire, or fires, an individual because the employer views that individual's impairment as limiting her in the major life activity of working does not mean that such an individual will prevail in an ADA suit. It means only that the case will proceed to the next question: whether the individual is a qualified person with a disability, *i.e.*, whether she could perform the essential functions of the position with or without reasonable accommodation. In the present case, it is undisputed that United rejected petitioners' applications to become pilots because it regarded their poor vision as rendering them unable to perform that job. This is all that petitioners were required to show in order to establish that they are persons with disabilities under the third prong of the ADA definition.

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[19] Of course, if this view of the impact of the disability on certain jobs is so widely held, it may also be the case that persons with such disabilities are legitimately not qualified for such jobs.

## CONCLUSION

For the reasons stated above, the judgment below should be reversed.

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